UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DOROTHY FITZGERALD,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 96-283-P-C***
	)	
DOWNEAST ENERGY CORP., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

The plaintiff, Dorothy Fitzgerald, brings this action under the Oil Pollution Act ("OPA"), 33 U. S. C. § 2701 *et seq*., and Maine common law, seeking to recover for damages to her property and business. Defendants DownEast Energy Corp. and Brunswick Coal & Lumber Co. have moved to dismiss the action, apparently under Fed. R. Civ. P. 12(b)(1) and (6). Defendant Les Wilson & Sons orally joined in the motion to dismiss at a conference of counsel held on February 28, 1997. The remaining defendant, J. B. Plunkett Associates, Inc., apparently filed in bankruptcy on October 24, 1996, *see* Docket No. 11, and has not accepted service. I recommend that the motion be granted in part and denied in part.

I. Standard for Reviewing Motion to Dismiss

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc*., 946

F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc*., 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ*., 9 F.3d 184, 187 (1st Cir. 1993). Although all inferences must be indulged in the plaintiff's favor, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments, and claims that are not included in the complaint. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

II. Factual Background

The complaint makes the following assertions. This action arises under 33 U.S.C. § 2717(b) because it involves a discharge of oil from an oil storage facility "which has reached the

Androscoggin River, a navigable water of the United States, and/or poses a substantial threat of discharge to the Androscoggin River," Complaint (Docket No. 1) ¶¶ 3, 4, and a discharge of oil to adjoining shorelines of the Androscoggin River, *id.* ¶ 5. The spill occurred in Lisbon Falls, Maine, at the Morse Brothers Oil Terminal Facility. *Id.* ¶¶ 9, 18. The spill was reported by defendant DownEast in November 1992. *Id.* ¶ 18. Either DownEast or defendant Brunswick Coal & Lumber owned underground tanks at the Facility that were the source of the spill. *Id.* ¶¶ 16, 17, 30, 38.

The plaintiff owned residential and commercial property immediately adjacent to the Facility. *Id.* ¶ 13. The property had three residential units and an office used by the plaintiff for a real estate business. *Id.* The Facility is located approximately 700 feet from the public drinking water wells of the town of Lisbon Falls and 1,500 feet from the Androscoggin River; the sewer line that runs from the Facility to the river is approximately 2,800 feet long. *Id.* ¶ 27. In May 1991 the Maine Department of Environmental Protection ("DEP") found oil in the sewer line and required DownEast to test the tanks at the Facility as a result. *Id.* ¶ 29. A kerosene tank at the Facility failed its test in September 1992; when it was removed in November 1992, the soil around the tank was found to be contaminated. *Id.* ¶ 30. DownEast hired defendants J. B. Plunkett and Les Wilson & Sons to remove the underground tanks at the site, investigate the extent of the contamination, and do remedial work. *Id.* ¶ 19.

In June 1993 the defendants asked the plaintiff for permission to cross her property in order to demolish the buildings at the Facility and remove two additional underground tanks. *Id.* ¶ 34. The tanks were removed during that month, and the soil around them was found to be contaminated. *Id.* ¶ 38. Sampling of the soil was done at the Facility and on the plaintiff's property. *Id.* ¶¶ 36, 40. By letter dated October 6, 1993, the DEP advised the plaintiff that "a small part of the contamination

originating on the Morse Brothers site has approached and crossed over the property boundary separating your properties." *Id.* ¶ 41. The plaintiff gave the defendants permission to do remedial work on her property as outlined in the DEP letter. *Id.* ¶ 43.

The defendants used the plaintiff's property as a staging area for the remedial work without her permission. *Id.* ¶¶ 44-47. Access to her real estate business was blocked off. *Id.* ¶ 48. One of the plaintiff's tenants demanded relocation during the remedial work due to exposure to fumes and stress. *Id.* ¶ 51. The defendants used electricity from the plaintiff's property for the remedial work without her permission or knowledge for three weeks. *Id.* ¶ 52. The construction phase of the remedial work lasted six weeks. *Id.* ¶ 55. Contaminated soil remains below the building on the plaintiff's property. *Id.*

The defendants installed a system designed to pump and treat contaminated ground water from the site. *Id.* ¶ 60. The treated ground water, "which may contain some residual petroleum," is discharged into the Lisbon Falls storm sewers, which discharge into the Androscoggin River. *Id.* ¶ 61. The pump runs continually. *Id.* From 1993 through 1995, the town shut down the street in front of the plaintiff's property every time samples were taken from the monitoring wells that were installed by the defendants, making access to the property impossible. *Id.* ¶¶ 62-63. Sampling of the wells continues to interfere with access to the property. *Id.* ¶ 63.

As a result of the defendants' activities, the building on the plaintiff's property has developed cracks, its porch has settled, and its basement has become wet. *Id.* ¶ 67. The noise of the pump interferes with the plaintiff's use and enjoyment of the property. *Id.* ¶ 71. The disruptions to her business ultimately forced her to close it. *Id.* ¶ 69.

The complaint asserts a claim for relief under the OPA against defendants DownEast Energy

and Brunswick Coal & Lumber, and state-law claims for trespass, nuisance, negligent infliction of emotional distress and ultrahazardous activity against all defendants.

III. Analysis

A. Federal Claim

The plaintiff's federal claim is brought under 33 U. S. C. § 2702(a), which provides in relevant part: "[E]ach responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident." "Damages" is further defined, in relevant part, as "[d]amages for injury to, or economic losses resulting from destruction of, real or personal property" and "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources." 33 U. S. C. § 2702(b)(2)(B) & (E).

1. Subject Matter Jurisdiction.

The defendants' motion under Rule 12(b)(1) is based on 33 U.S.C. § 2713(a), the section of the OPA that establishes a procedure for presentation of claims. That subsection of the statute provides: "Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title." The claimant may bring suit 90 days after presentation of the claim, if the claim is not settled, or at any time after the responsible party denies all liability. 33 U.S.C. § 2713(c). For purposes of this action, "responsible party" is defined as the owner of an onshore

facility. 33 U. S. C. § 2701(32)(B). The plaintiff in this case presented her claim to defendant DownEast Energy. Exh. A to DownEast Energy Corp. and Brunswick Coal & Lumber's Motion to Dismiss ("Defendants' Motion") (Docket No. 5). The parties do not dispute, for the purposes of the motion to dismiss, that DownEast Energy is the responsible party under section 2714(a). The moving defendants contend that the claim-presentment requirement of section 2714 is jurisdictional and that this court lacks jurisdiction over the OPA claim because the notice of claim itself was not attached to the complaint and the notice lacks the necessary specificity to present a claim within the statutory definitions.

The defendants present no argument or authority to support their assertion that subject matter jurisdiction may only be established when a copy of the notice itself is attached to the complaint. The complaint alleges compliance with the statutory notice requirement. Complaint ¶ 6. Even though that allegation is only a conclusory recitation of the statutory language, the defendants suggest no reason why that pleading should be regarded as insufficient. In the absence of any citation to authority for the defendants' extremely narrow, if not hypertechnical, view of the necessary means by which a plaintiff must allege the existence of jurisdiction in a complaint, this argument will not be addressed further.

The defendants next argue that the notice itself, a letter from the plaintiff's counsel to DownEast Energy, is deficient under statutory definitions and the regulations implementing section 2714(a). A "claim" is defined in the OPA as "a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident." 33 U.S.C. § 2701(3). An "incident" is defined as "any occurrence or series of occurrences having the same origin, involving one or more . . . facilities . . ., resulting in the discharge or substantial threat of discharge of oil." The

notice provided by plaintiff's counsel demands payment of $10,000 in removal costs, $150,000 for devaluation of her real property, and "at least" $500,000 for lost business income. Counsel for DownEast Energy responded to the notice, some six weeks later, with a request for further information. Exh. B to Defendants' Motion.

The notice does appear to be a request in writing for a sum certain. The regulations to which the defendants refer are found at 33 C.F.R. § 136.1 *et seq.* While the statement of purpose of these regulations includes "other related matters," 33 C. F. R. § 136.1(a)(3), it is clear from the body of the regulations that the requirements set forth for the content of written claims are intended to apply to claims made to the Oil Spill Liability Trust Fund that is established by the OPA. *E.g.*, 33 C.F.R. §§ 136.101, 136.105(d)(10). It is not at all clear that the regulations are also intended to apply to the content of notices of claim that are presented to responsible parties.

The plaintiff first asserts that the notice-of-claim requirement is not jurisdictional. The only courts that have addressed this question in reported decisions have ruled otherwise. *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 240 (11th Cir. 1995); *Marathon Pipe Line Co. v. LaRoche Indus., Inc.*, 944 F. Supp. 476, 477 (E. D. La. 1996); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E. D. Va. 1993). The First Circuit has required strict compliance with a sixty-day notice requirement in the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, holding that the requirement is jurisdictional. *Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 80, 83 (1st Cir. 1985). *Cf. Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989). The statutory language at issue in this action does not differ so significantly from that at issue in *Garcia* as to warrant a different conclusion. However, the jurisdictional inquiry does not end here. Unlike the plaintiff in *Boca Ciega*, the plaintiff here has presented a written notice of claim to the responsible party. Before

addressing the question whether the notice was fatally deficient, however, it is necessary to discuss the plaintiff's argument that section 2713 does not apply under the circumstances of this case.

The plaintiff argues that section 2713(a) is not applicable because the source of the discharge at the Facility was not designated under section 2714(a), which provides, in relevant part: "When the President receives information of an incident, the President shall, where possible and appropriate, designate the source or sources of the discharge or threat." Section 2713(a) provides that claims shall be presented first to the party responsible for the source "designated under Section 2714(a)." The plaintiff argues that she therefore need not present her claim to DownEast Energy before bringing suit, because there has been no presidential designation of a source at the Facility. Neither party has submitted any evidence of such a designation, or the lack thereof. Even if the lack of a designation were appropriately established in the record, however, the plaintiff's argument could not prevail.

The plaintiff's interpretation of section 2713(a) would result in the invocation of the OPA, in private causes of action, without the 90-day period for negotiation and possible settlement that is an integral feature of the Act, whenever a particular source of a discharge, or substantial threat of a discharge, is not brought to the President's attention or when designation is determined not to be possible or appropriate. Such designation is required when private claims are first presented to the Fund rather than to a responsible party. 33 U.S.C. § 2713(b)(1). In other cases, the incongruity noted above is emphasized by a conflict between section 2713(a), as interpreted by the plaintiff, and section 2713(c), which allows a private cause of action *only* if a notice of claim is presented in accordance with section 2713(a). It is a basic rule of statutory construction that one provision of a statute should not be interpreted in a manner that renders another provision meaningless. *See, e.g.,*

United States v. Holmquist, 36 F.3d 154, 160 (1st Cir. 1994); *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 394 (D. Me. 1994). I conclude that the plaintiff is required by section 2713(a) to present her claim to the responsible party before bringing this action.

The defendants base their argument that the plaintiff's notice of claim was fatally deficient on *Colonial Pipeline*. In that case, the plaintiffs had not presented their claim under the OPA to the defendant before filing suit. 830 F. Supp. at 311. Instead, they sent a letter to the defendant five days after filing suit which they identified as their presentation of the claim. *Id.* At the time the court ruled on the defendant's motion to dismiss, ninety days had not passed since the letter was sent to the defendant. The court held that the letter failed to present a claim because it contained no description of the nature or extent of the plaintiffs' alleged damages, nor did it explain the basis for the claimed damages. *Id.* The letter also failed to state a sum certain for any of the types of damages alleged, or a total amount of damages claimed. *Id.* The court referred to the regulations governing claims presented to the Fund as a measure of the adequacy of the letter, although it did not hold that the regulations applied to claim presented to responsible parties rather than to the Fund. *Id.* The court dismissed the OPA claim.

Here, the plaintiff's notice of claim, presented to DownEast Energy in a timely fashion, does state a total amount of damages claimed and a sum certain for each type of damages claimed.[1] It

[1] Contrary to the defendants' position, the fact that the plaintiff claimed $10,000 in removal costs in her counsel's letter presenting the claim to DownEast Energy but does not include such a claim in her complaint does not render the presentation of claim insufficient to establish jurisdiction in this court. The point of the claim presentation procedure is to allow the parties to negotiate a possible settlement of the claim. If the claimant determines in the 90-day period between presentation of her claim to the responsible party and the date upon which she may file an action in court that she is not entitled to recover removal costs, she should not be penalized by losing her entire claim if she appropriately chooses not to include that particular element of the claim in her (continued...)

does not describe the nature of the alleged damages in any detail, nor does it explain the basis for the claims. However, the information provided does appear sufficient to allow settlement negotiations to begin. Neither DownEast Energy's decision to wait six weeks before requesting additional information nor the plaintiff's apparent disregard of that request can control the outcome on a motion to dismiss. The plaintiff's notice of claim was minimally adequate under the jurisdictional requirements of section 2713.[2]

2. Failure to state a claim upon which relief may be granted.

The moving defendants argue that the complaint fails to state a claim upon which relief may be granted under this statute because it provides only an unsupported conclusion of fact that an actual discharge of oil to a navigable water occurred and it fails to allege facts sufficient to support its allegation of a substantial threat of a discharge of oil to such waters. The defendants assume for purposes of their motion that the Androscoggin River is a navigable water within the statutory definition of that term. 33 U.S.C. § 2701(21).

The defendants' argument is based upon an assertion that the complaint alleges only a single "incident," an oil spill in November 1992, and that it fails to allege that kerosene from that spill reached the Androscoggin River. That reading of the complaint, like the reading of the statute upon which it is based, is too narrow. The OPA definition of an incident includes a series of occurrences

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[1](...continued)
court action.

[2] The defendants assert that the plaintiff's notice of claim addresses only a spill of kerosene on November 20, 1992, and that the court therefore lacks subject matter jurisdiction over any other "spills." This argument mischaracterizes the notice, mistakenly assumes that the date of discovery of contamination is also the date of the "incident" of discharge or threatened discharge for which section 2704 establishes liability, and mistakenly assumes that each "spill" is a separate "incident." The defendants have provided no basis to so limit the plaintiff's claim at this point in the proceeding.

having the same origin resulting in a discharge of oil. 33 U.S.C. § 2701(14). "Discharge" is defined as "any emission (other than natural seepage), intentional or unintentional, . . . includ[ing] . . . spilling, leaking, pumping, pouring, emitting, emptying, or dumping." *Id*. § 2701(7). A pleading thus need not be limited to a single discharge, and the plaintiff's claim, fairly read, is not so limited. The complaint alleges spills from the tanks "[d]uring the last four years that the Morse Brothers facility operated," Complaint ¶ 28, contaminated soil discovered around all the tanks in 1992 and 1993, and the possible continuing discharge of oil in treated ground water into the storm drains that empty into the Androscoggin River. A fair inference may be drawn from the allegations in the complaint that the oil found in 1991 by the DEP in the sewer line running into the Androscoggin River is alleged to have originated from the Morse Brothers facility, which is also alleged to be the source of contamination on the plaintiff's property. *Id.* ¶¶ 29-30, 41. It is also logical to infer that this oil is the discharge alleged in paragraphs 4 and 5 of the complaint to have reached the Androscoggin River or to pose a substantial threat of doing so. The plaintiff will have to present proof to support this allegation at trial, or to resist summary judgment, but she need not do so in response to a motion to dismiss.

The defendants rely on *Sun Pipe Line Co. v. Conewago Contractors, Inc.*, 39 ERC 1719, 1994 WL 539326 (M. D. Pa. Aug. 22, 1994), and a district court opinion subsequently vacated because the district court lacked subject matter jurisdiction, *Avitts v. Amoco Production Co*., 840 F. Supp. 1116 (S.D. Tex. 1994), *vacated* 53 F.3d 690 (5th Cir. 1995), as authority for their Rule 12(b)(6) argument. Neither case provides persuasive authority.[3] While the plaintiff's response to

[3] A decision vacated by an appellate court on jurisdictional grounds, as was the case in *Avitts*, has no precedential force. *In re Daniel*, 771 F.2d 1352, 1361 (9th Cir. 1985).

this argument is minimal, the defendants' argument is not well supported. Both *Sun Pipe Line* and *Avitts* are distinguishable. The complaint in *Sun Pipe Line,* unlike the instant complaint, alleged no link to any navigable water. 1994 WL 539326 at *12. The *Avitts* court merely stated in *dictum* that "[a]t some point the [oil] fields' arguable proximity to drainage systems which ultimately feed into navigable waters only after great distance will provide simply too remote a threat to bring the action within the strictures of the OPA." 840 F. Supp. at 1122. That statement provides no guidance for evaluation of the facts alleged in the complaint before this court. The defendants essentially ask this court to hold that oil found in a sewage system feeding into a navigable water at a distance of no more than 2,800 feet is too remote to establish OPA jurisdiction over the source of that oil as a matter of law. I cannot discern any compelling reason to do so.

The defendants also argue that the complaint fails to state a claim for lost profits, removal costs, and attorney fees under the OPA. The plaintiff does not respond to the argument concerning removal costs, and the complaint does not appear to raise a claim for such costs. Complaint ¶ 76 & pp. 17-18. The complaint can be read to allege that the loss of income is due to the injury to the plaintiff's real or personal property caused by the defendants. 33 U.S.C. § 2702(b)(2)(E); *see Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 669, 679 (E.D. Mich. 1992) (necessary to allege injury, destruction or loss to property in order to avoid dismissal of damages claim under section 2702(b)(2)(E)).

The plaintiff responds to the defendants' argument concerning attorney fees merely by stating that the issue of their availability may be resolved "after the Plaintiff prevails." Plaintiff's Objection to Defendants' Motion to Dismiss (Docket No. 10) at 16. While that is an accurate statement, there is no procedural bar to consideration of the availability of attorney fees before resolution of a lawsuit

by trial. "Absent an explicit statutory authorization, a party is not entitled to recover attorney fees simply because it prevailed in the litigation." *In re Hemingway Transport, Inc*., 993 F.2d 915, 934 (1st Cir. 1993) (citation omitted). There is no explicit statutory authorization in the OPA for the award of attorney fees to prevailing parties. Therefore, attorney fees are unavailable in connection with the federal claim. *Id.* They are also unavailable on the state common-law claims raised in the remaining counts of the complaint. *Jackson v. Inhabitants of the Town of Searsport*, 456 A.2d 852, 855-56 (Me. 1983). Because the plaintiff cannot recover attorney fees on any viable theory set forth in her complaint, the defendants are entitled to dismissal of her claim for attorney fees.

B. The State Law Claims

The defendants have also requested dismissal of the state-law claims pursuant to 28 U.S.C. § 1367(c). Because I conclude that the federal claim should not be dismissed, dismissal of the state-law claims at this time under section 1367(c) is inappropriate.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** as to any claims for attorney fees and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of May, 1997.

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David M. Cohen
United States Magistrate Judge